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Receivables Financing

Analytical Commentary on the draft Convention on Assignment of Receivables in International Trade

Addendum

Note by the Secretariat

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I. Introduction

1. The commentary on articles 1 to 17 of the draft Convention is contained in document A/CN.9/489. The present note contains the commentary on the remaining provisions of the draft Convention and the annex to the draft Convention, as they appear in document A/CN.9/486, Annex I.[1]

II. Analytical commentary

A. Chapter IV
Rights, obligations and defences

1. Section II
Debtor

Article 18
Notification of the debtor

1. Notification of the assignment or a payment instruction is effective when received by the debtor if it is in a language that is reasonably expected to inform the debtor about its contents. It is sufficient if notification of the assignment or a payment instruction is in the language of the original contract.

2. Notification of the assignment or a payment instruction may relate to receivables arising after notification.

3. Notification of a subsequent assignment constitutes notification of all prior assignments.

References

A/CN.9/420, paras. 124 and125; A/CN.9/432, paras. 176,177 and 187; A/CN.9/434, paras. 172-175; A/CN.9/447, paras. 45-47, 158 and 159; A/CN.9/455, paras. 59-66; A/CN.9/456, paras. 177-180; and A/CN.9/486, paras. 12-20.

Commentary

Time of effectiveness of notification: the receipt rule

2. The primary purpose of article 18 is to state the "receipt rule" with regard to the time of effectiveness of a notification, that is, that both a notification and a payment instruction become effective when received by the debtor. When exactly a debtor is deemed to receive a notification is a matter left to law applicable outside the draft Convention. Article 18, paragraph 1, also adds a requirement to those provided in article 5 (d) for a notification to be effective under the draft Convention, namely that a notification has to be in a language "that is reasonably expected to inform the debtor". In referring to expectations, paragraph 1 introduces a subjective criterion which is, however, limited by the reference to the reasonableness of such expectations. To

[1] The previous version of the commentary on the entire draft Convention is contained in document A/CN.9/470.

provide guidance to parties, paragraph 1 introduces a "safe harbour" rule, according to which the language of the original contract meets the required standard of a language reasonably expected to inform the debtor (for the relationship between a notification and a payment instruction, see A/CN.9/489, para. 124).

Notification with respect to receivables not existing at the time of notification

3. Unlike article 8, paragraph 1 (c), of the UNIDROIT Convention on International Factoring (Ottawa, 1988; "the Ottawa Convention") and in line with normal practice in receivables financing, paragraph 2 allows a notification to be given with respect to receivables not existing at the time of notification. Such a notification simplifies and reduces the cost of notification in that it ensures that notification does not have to be given each time a receivable arises. It also ensures that, once a receivable arises, the debtor cannot accumulate rights of set-off from unrelated contracts with the assignor or modify the original contract without the consent of the assignee. More importantly, paragraph 2 sets aside any limitations existing under law applicable outside the draft Convention with respect to notification relating to receivables not existing at the time of notification. As this matter is governed in article 18, it is not referred to the law of the assignor's location (see opening words of article 24 and para. 35).

Notification in subsequent assignments

4. Paragraph 3, which is inspired by article 11, paragraph 2, of the Ottawa Convention, validates normal practice in particular in international factoring transactions. In view of the fact that the debtor is normally notified only of the second assignment from the export factor to the import factor, it is essential to ensure that notification of the second assignment covers the first assignment from the assignor to the import factor as well. In the absence of notification with respect to the first assignment, that assignment might be rendered ineffective as against the debtor, a situation that might affect the effectiveness of the second assignment as well. In order to address subsequent assignments in general, paragraph 3 provides that a notification covers any prior, and not only the immediately preceding, assignment (with regard to the issue of the discharge of the debtor in the case of several notifications relating to subsequent assignments, see para. 12). Paragraph 3 does not require the notifying party to identify prior assignments. However, in the case of doubt, the debtor may request that information (see article 19, paragraph 7, and para. 13). In addition, nothing in paragraph 3 (or in articles 5 (d) or 15) precludes the assignor in a prior assignment from notifying the debtor about a subsequent assignment to which that assignor is not a party.

Article 19
Debtor's discharge by payment

1. Until the debtor receives notification of the assignment, the debtor is entitled to be discharged by paying in accordance with the original contract.

2. After the debtor receives notification of the assignment, subject to paragraphs 3 to 8 of this article, the debtor is discharged only by paying the assignee or, if otherwise instructed in the notification of the assignment or subsequently by the assignee in a writing received by the debtor, in accordance with such payment instruction.

3. If the debtor receives more than one payment instruction relating to a single assignment of the same receivable by the same assignor, the debtor is discharged by paying in accordance with the last payment instruction received from the assignee before payment.

4. If the debtor receives notification of more than one assignment of the same receivable made by the same assignor, the debtor is discharged by paying in accordance with the first notification received.

5. If the debtor receives notification of one or more subsequent assignments, the debtor is discharged by paying in accordance with the notification of the last of such subsequent assignments.

6. If the debtor receives notification of the assignment of a part of or an undivided interest in one or more receivables, the debtor is discharged by paying in accordance with the notification or in accordance with this article as if the debtor had not received the notification. If the debtor pays in accordance with the notification, the debtor is discharged only to the extent of the part or undivided interest paid.

7. If the debtor receives notification of the assignment from the assignee, the debtor is entitled to request the assignee to provide within a reasonable period of time adequate proof that the assignment from the initial assignor to the initial assignee and any intermediate assignment have been made and, unless the assignee does so, the debtor is discharged by paying in accordance with this article as if the notification from the assignee had not been received. Adequate proof of an assignment includes but is not limited to any writing emanating from the assignor and indicating that the assignment has taken place.

8. This article does not affect any other ground on which payment by the debtor to the person entitled to payment, to a competent judicial or other authority, or to a public deposit fund discharges the debtor.

References

A/CN.9/420, paras. 98-117, 127-131, 169-173 and 179; A/CN.9/432, paras. 165-174 and 178-204; A/CN.9/434, paras. 176-191; A/CN.9/447, paras. 69-93 and 153-157; A/CN.9/455, paras. 52-58; A/CN.9/456, paras. 181-193; A/CN.9/466, paras. 124-132; and A/CN.9/486, paras. 21-29.

Commentary

5. The main goal of article 19 is to provide certainty as to the debtor's discharge and to thus facilitate payment of the debt. It is not intended to deal with the discharge of the debtor in general or with the payment obligation as such, since that obligation is subject to the original contract and to the law governing that contract. It is not intended to address issues of priority either. The debtor may be discharged in accordance with article 19 even if the payee does not have priority (see para. 9 below). It is up to the person with priority to claim the proceeds of payment by the debtor.

Debtor's discharge by payment before and after notification

6. Under paragraph 1, until the time of receipt of a notification, the debtor is entitled to discharge by paying in accordance with the original contract. In view of the fact that the assignment is effective as of the time of the conclusion of the contract of assignment, the debtor, having knowledge of the assignment, may choose to discharge its debt by paying the assignee even before notification. However, in such a case the debtor takes the risk of having to pay twice, if it is later proved that there was no assignment at all or, at least, no effective assignment. In order to avoid undermining practices in which the debtor is normally expected to continue paying the assignor even after notification there is no explicit reference to the possibility of the debtor being able to pay before notification either the assignor or the assignee. The reference to payment "in accordance with the original contract", rather than to payment to the assignor, is intended to preserve any payment agreement between the assignor and the debtor (e.g. payment to a bank account or address, or payment to a third person).

7. After notification, the debtor may discharge its obligation only by paying the assignee or as instructed by the assignee. Reflecting normal practice, paragraph 1 recognizes payment

instruction as a notion distinct from notification. While in some practices (e.g. factoring) payment instructions are given together with notification, in other practices (e.g. undisclosed invoice discounting or securitization), notification may be given without any payment instructions. The purpose of such a notification is normally to freeze the debtor's rights of set-off. To avoid leaving any uncertainty, paragraph 2 repeats what is already stated in article 15, paragraph 1, namely, that such instructions may be given, up to notification, by the assignor and, subsequently, only by the assignee. Paragraph 2 is also intended to clarify that a payment instruction should be in writing.

Knowledge of an assignment

8. Knowledge of an assignment is not to be treated as having the effect of a notification and does not trigger a change in the way in which the debtor has to discharge its obligation. While making business practice conform to good faith standards is an important goal, this should not be at the expense of certainty. Certainty as to the discharge of the debtor would be reduced if it were to be subject to subjective and unclear circumstances, such as knowledge on the part of the debtor (issues such as what constitutes knowledge and who has to establish it would need to be addressed). In addition, knowledge should not trigger a change in the way the debtor is to discharge its obligation, since, in certain cases, it is normal business practice for the debtor to continue paying the assignor even though the debtor knows (or is even notified) of the assignment (see para. 6). Article 19 does not deal with the issue of payment to a person, the assignment to whom was null and void (e.g. for fraud or duress or lack of capacity to act) or whether knowledge of such nullity should be taken into account in the debtor's discharge. As this problem arises only in exceptional situations, it is left to law applicable outside the draft Convention.

Debtor's discharge and priority

9. Unlike article 8, paragraph 1, of the Ottawa Convention, article 19 does not require the debtor to pay the person with a superior right (priority) so as to obtain a valid discharge. In line with the principle of debtor protection, article 19 draws a clear distinction between the debtor's discharge and priority among competing claimants. Thus, payment under article 19 discharges the debtor, even if the person receiving payment does not have priority. It would be unfair and inconsistent with the policy of debtor protection to require the debtor to determine who among several claimants has priority and to have the debtor pay a second time if, in the first instance, it has paid the wrong person. The debtor would most likely have a cause of action against that person, but the debtor's rights may be frustrated if that person becomes insolvent. The risk of insolvency of the person who received payment should be on the various claimants of the receivables and not on the debtor. Such claimants have normally ways to ensure that they have priority and that the debtor is notified accordingly.

Change or correction of payment instructions

10. Paragraph 3 is intended to ensure that the assignee may change or correct its payment instructions. A new instruction is effective if given by the assignee, since the first instruction constitutes notification and after notification only the assignee may give a payment instruction (see articles 15, paragraph 1 and 19, paragraph 2). In order to protect the debtor against the risk of having to pay twice, paragraph 3 allows the debtor to disregard a payment instruction received by the debtor after payment.

Multiple notifications

11. Paragraphs 4 and 5 are intended to provide simple and clear discharge rules in the case of several notifications. Paragraph 4 deals with situations in which the debtor receives several notifications relating to more than one assignment of the same receivables by the same assignor ("duplicate assignments"). Such situations do not necessarily involve fraud. They may, for

example, involve several assignments (including outright assignments) for security purposes of receivables for credit not exceeding the value of the receivables. In such assignments, the main issue is who will obtain payment first (i.e. who has priority), a matter dealt with in article 24.

12. Paragraph 5 deals with situations in which several notifications are given with respect to one or more subsequent assignments. Such situations are rare in practice, since normally only the last in a chain of assignees notifies the debtor and requests payment. In any case, in order to avoid any uncertainty as to how the debtor may discharge its debt, paragraph 5 provides that the debtor has to follow the instructions contained in the notification of the last assignment in a chain of assignments. For that rule to apply, the notifications received by the debtor have to be readily identifiable as notifications relating to subsequent assignments. Otherwise, the rule contained in paragraph 4 would apply and the debtor would be discharged by payment in accordance with the first notification received. In any case, under paragraph 7, the debtor, if in doubt, can request adequate proof from the assignees notifying. In the case of several notifications relating to both duplicate and subsequent assignments, paragraph 4 and 5 will provide a solution. In line with the principle of debtor protection, in the case of several notifications relating to partial assignments, paragraph 6 allows the debtor to discharge by paying the several creditors or to treat the notification as ineffective and to discharge in accordance with article 19.

Right of the debtor to request additional information

13. Under article 15, notification may be given not only by the assignor but also by the assignee independently of the assignor. As a result, the debtor may receive notification of the assignment from a possibly unknown person and may be in doubt as to whether that person is a legitimate claimant, payment to whom would discharge the debtor. In addition, under article 18, paragraph 3, notification of a subsequent assignment constitutes notification of any prior assignment even if such assignment is not identified in the notification. In order to protect the debtor from uncertainty as to how to discharge its debt in such cases, paragraph 7 gives the debtor a right to request the assignee to provide within a reasonable period of time adequate proof of the initial assignment and, if it is not an initial but a subsequent assignment, of any preceding assignment. The debtor may, but does not have to, request adequate proof. If the debtor had to request adequate proof in all cases, payment would be delayed or assignees foreseeing that the debtor would request such proof would provide it in the notification, a result that could raise the cost of notification. The determination of what constitutes "adequate" proof and a "reasonable" period of time is a matter of interpretation for the courts or arbitral tribunals taking into account the particular circumstances. The flexibility introduced with these terms was thought to be necessary since no rule could suit all possible cases. However, in order to avoid any uncertainty that might ensue as a result, paragraph 7 includes a "safe harbour" rule. According to that rule, a written confirmation from the assignor constitutes adequate proof.

14. Notification does not trigger the obligation to pay, which remains payable at the time and according to the terms of the original contract and the law applicable thereto. This means that the debtor does not have to pay upon notification and does not owe interest for late payment while it awaits the adequate proof requested. If the receivable becomes payable in accordance with the original contract within that period, the debtor may still be able to discharge its obligation, for example, by paying to a public deposit fund (see article 19, paragraph 8). If such alternative method of payment is not available, the payment obligation should be suspended until the debtor receives adequate proof and has a reasonable time to assess and act on it. Otherwise, the protection afforded to the debtor by paragraph 7 would be meaningless.

Debtor's discharge under other law

15. Paragraph 8 is intended to ensure that article 19 does not exclude other ways of discharge of the debtor's obligation by payment to the right person that may exist under national law

applicable outside the draft Convention (e.g. payment in accordance with a notification not conforming with the requirements of article 6 (f), 15 or 18).

Article 20
Defences and rights of set-off of the debtor

1. In a claim by the assignee against the debtor for payment of the assigned receivables, the debtor may raise against the assignee all defences and rights of set-off arising from the original contract, or any other contract that was part of the same transaction, of which the debtor could avail itself if such claim were made by the assignor.

2. The debtor may raise against the assignee any other right of set-off, provided that it was available to the debtor at the time notification of the assignment was received.

3. Notwithstanding paragraphs 1 and 2 of this article, defences and rights of set-off that the debtor may raise pursuant to article 11 against the assignor for breach of agreements limiting in any way the assignor's right to assign its receivables are not available to the debtor against the assignee.

References

A/CN.9/420, paras. 66-68 and 132-135; A/CN.9/432, paras. 205-209; A/CN.9/434, paras. 194-197; A/CN.9/447, paras. 94-102; A/CN.9/456, paras. 194-199; A/CN.9/466, paras. 133-136; and A/CN.9/486, paras. 30-32.

Commentary

16. With the exception of defences and rights of set-off referred to in paragraphs 2 and 3, the debtor has against the assignee all the defences and rights of set-off that the debtor could raise against the assignor. What those defences and rights of set-off are is a matter not addressed in the draft Convention but left to other law. However, as the assignee is not a party to the original contract, the assignee incurs no positive contractual liability for non-performance by the assignor. In such a case, the debtor can raise the non-performance to defeat the assignee's claim, but needs to make a separate claim against the assignor to obtain, for example, compensation for any loss suffered as a result of the assignor's non-performance (see para. 29).

17. Under paragraph 1, there is no limitation as to defences or rights of set-off that arise from the original contract or from a closely connected contract (e.g. a maintenance or other service agreement). Such defences and rights of set-off (transaction set-off) may be raised even if they become available to the debtor after notification is received. According to paragraph 2, any other rights of set-off (independent set-off) may be raised against the assignee only if they are available to the debtor at the time notification is received. Such rights include rights arising from a separate contract between the assignor and the debtor, a rule of law (e.g. a tort rule) or a judicial or other decision. The reason for this approach is that the rights of a diligent assignee should not be made subject to rights of set-off arising at any time from separate dealings between the assignor and the debtor or other events of which the assignee could not reasonably be expected to be aware. Uncertainty as to the debtor's defences and rights of set-off would also make it difficult for the assignee to price the credit offered to the assignor. Furthermore, a contrary approach could have the unintended effect of allowing the assignor and the debtor to manipulate the amount owed. If the fact that the debtor cannot accumulate rights of set-off constitutes an unacceptable hardship for the debtor, the debtor can avoid entering into new dealings with the assignor. Rights of set-off arising from a separate contractual or other relationship between the debtor and the assignee are not affected by this rule and may be raised at any time. The exact meaning of the term "available" (e.g. whether the right of set-off has to be actual and ascertained, mature or quantified at the time notification is received by the debtor) is also left to other law.

18. Paragraph 3 is intended to ensure that the debtor may not raise against the assignee by way of defence or set-off the breach of a contractual limitation on assignment by the assignor. The debtor may have a cause of action against the assignor, if, under law applicable outside the draft Convention, the assignment constitutes a breach of contract that results in a loss to the debtor. However, the mere existence of a contractual limitation is not a violation of the representation contained in article 14, paragraph 1 (a) (see A/CN.9/489, para. 117). Otherwise, the rule holding the assignee harmless for breach of contract by the assignor (see article 11, paragraph 2) could be deprived of any meaning.

Article 21
Agreement not to raise defences or rights of set-off

1. Without prejudice to the law governing the protection of the debtor in transactions made for personal, family or household purposes in the State in which the debtor is located, the debtor may agree with the assignor in a writing signed by the debtor not to raise against the assignee the defences and rights of set-off that it could raise pursuant to article 20. Such an agreement precludes the debtor from raising against the assignee those defences and rights of set-off.

2. The debtor may not exclude:

(a) Defences arising from fraudulent acts on the part of the assignee; or

(b) Defences based on the debtor's incapacity.

3. Such an agreement may be modified only by an agreement in a writing signed by the debtor. The effect of such a modification as against the assignee is determined by article 22, paragraph 2.

References

A/CN.9/420, paras. 136-144; A/CN.9/432, paras. 218-238; A/CN.9/434, paras. 205-212; A/CN.9/447, paras. 103-121; A/CN.9/456, paras. 200-204; A/CN.9/466, paras. 137-140; and A/CN.9/486, paras. 33-34.

Commentary

19. In return for better credit terms, assignors normally guarantee as against assignees the absence of defences and rights of set-off by the debtor (see article 14, paragraph 1 (c)). For the same reason, debtors often waive their defences and rights of set-off. With a view to facilitating this practice, article 21 validates such waivers of defences and rights of set-off. In order to avoid uncertainty as to the legal consequences of a waiver, paragraph 1 states what may appear to be obvious in some legal systems, namely, that a waiver agreed upon between the assignor and the debtor may benefit the assignee. In recognition of the fact that in practice a waiver may be agreed upon at different points of time, paragraph 1 does not make specific reference to the point of time at which a waiver may be agreed upon. Paragraph 1 does not require either that the defences be known to the debtor or be explicitly stated in the agreement by which the defences are waived. Such a requirement could introduce an element of uncertainty, since the assignee would need to establish in each particular case what the debtor knew or ought to have known. Whether the acceptance of an assignment by the debtor should be construed as a waiver or as a confirmation of a waiver and whether a waiver of defences is to be construed as a consent or confirmation of the debtor's consent to the assignment are matters left to other law.

20. Paragraph 1 is limited to waivers agreed upon by the assignor and the debtor. As a result, the limitations contained in paragraph 2 do not apply to waivers agreed upon by the debtor and the assignee and the debtor's ability to negotiate with the assignee in order to obtain a benefit is

not limited. At the same time, article 19 does not empower the debtor to negotiate waivers with assignees, if, under other law applicable, the debtor does not have such a power. In order to protect debtors from undue pressure by creditors to waive their defences, paragraphs 1 and 2 introduce reasonable limitations. Such limitations refer to the form in which such waivers can be made, to certain types of debtors and to certain types of defences.

21. Under paragraph 1, a waiver cannot be a unilateral act or an oral agreement. It has to take the form of a written agreement and one that is signed by the debtor (for the distinct notions of "writing" and "signature", see A/CN.9/489, paras. 60-61). This requirement is intended to ensure that both parties, and in particular the debtor, are well informed about the fact of the waiver and its consequences. It is also intended to facilitate evidence. In addition, a waiver cannot override the consumer-protection law prevailing in the country in which the debtor is located (for consumer receivables and consumer protection, see A/CN.9/489, paras. 36, 103 and 132). In cases where both articles 21 and 30 apply (i.e. the assignor is located in a Contracting State and that State has not opted out of chapter V), article 21 substitutes a specific applicable law reference to the debtor's location for the general rule set forth in article 30. In order to avoid terminological and other differences existing among the various legal systems with respect to the meaning of the notion "consumer", paragraph 1 uses generally accepted terminology from article 2 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980; "the Sales Convention").

22. Under paragraph 2, a waiver cannot relate to defences arising from fraudulent acts committed by the assignee alone or by the assignee in collusion with the assignor. Such a result would run counter to basic good faith standards. Paragraph 2 does not refer to defences relating to fraud committed only by the assignor. If the debtor could not waive such defences, the assignee would have to conduct an investigation in this regard. Such a result could create uncertainty and have a negative impact on the cost of credit.

23. In line with paragraph 1, paragraph 3 requires a written agreement signed by the debtor for the modification of a waiver. Parties need to be warned of the legal consequences of such a modification. Furthermore, those circumstances should be easily proved, if necessary. With a view to ensuring that a modification does not affect the rights of the assignee, paragraph 3 subjects it to the actual or constructive consent of the assignee (see article 22, paragraph 2, and para. 27 below).

Article 22
Modification of the original contract

1. An agreement concluded before notification of the assignment between the assignor and the debtor that affects the assignee's rights is effective as against the assignee and the assignee acquires corresponding rights.

2. After notification of the assignment, an agreement between the assignor and the debtor that affects the assignee's rights is ineffective as against the assignee unless:

(a) The assignee consents to it; or

(b) The receivable is not fully earned by performance and either the modification is provided for in the original contract or, in the context of the original contract, a reasonable assignee would consent to the modification.

3. Paragraphs 1 and 2 of this article do not affect any right of the assignor or the assignee for breach of an agreement between them.

References

A/CN.9/420, para. 109; A/CN.9/432, paras. 210-217; A/CN.9/434, paras. 198-204; A/CN.9/447, paras. 122-135; A/CN.9/456, paras. 205 and 206; A/CN.9/466, paras. 141 and 142; and A/CN.9/486, paras. 35-36.

Commentary

24. Contracts normally deal with their modification. Article 22 does not interfere with such contractual clauses. It does, however, deal with the third-party effects of such contract modifications, namely with the question whether the debtor has as against the assignee the right to modify the original contract and whether the assignee acquires rights as against the debtor under the modified original contract.

25. Before notification, the assignor and the debtor may freely modify their contract. They do not need to obtain the consent of the assignee, even though the assignor may have undertaken in the assignment contract to abstain from any contract modifications without the consent of the assignee or, under law applicable outside the draft Convention, the assignor may be under the good faith obligation to inform the assignee about a contract modification. The breach of such an undertaking may give rise to liability of the assignor as against the assignee (see para. 28). It does not, however, invalidate an agreement modifying the original contract, since such an approach would inappropriately affect the rights of the debtor. After notification, a modification of the original contract becomes effective as against the assignee subject only to the actual or constructive consent of the assignee. The underlying rationale is that, after notification, the assignee becomes a party to a triangular relationship and any change in that relationship that affects the assignee's rights should not bind the assignee against its will.

26. Paragraph 1 requires an agreement between the assignor and the debtor, which is concluded before notification of the assignment and affects the assignee's rights. If the agreement does not affect the rights of the assignee, paragraph 1 does not apply. If the agreement is concluded after notification, paragraph 2 applies. Notification takes effect when received by the debtor. After that time, the debtor may discharge its obligation only in accordance with the assignee's payment instructions (see article 19, paragraph 2).

27. Paragraph 2 is formulated in a negative way, since the rule is that, after notification, a modification is ineffective as against the assignee, unless an additional requirement is met. "Ineffective" means that the assignee may claim the original receivable and the debtor is not fully discharged by paying less than the value of the original receivable. Paragraph 2 requires actual or constructive consent of the assignee. Actual consent is required if the receivable has been fully earned by performance and the assignee has thus the reasonable expectation that it will receive payment of the original receivable. When an invoice is issued, a receivable should be considered as having been fully earned, even if the relevant contract has been performed partially. As a result, a partially performed contract may be modified only with the actual consent of the assignee. Constructive consent exists if the original contract allows modifications or a reasonable assignee would have given its consent. Such consent is sufficient if the receivable is not fully earned and the modification is foreseen in the original contract or a reasonable assignee would have consented to such a modification. In requiring actual or constructive consent, article 22 is intended to establish an appropriate balance between certainty and flexibility. If a receivable is fully earned, its modification affects the reasonable expectations of the assignee and has thus to be subject to the actual consent of the assignee. If, on the other hand, a receivable is not fully earned, there is no need to overburden the parties with requirements that may affect the efficient operation of a contract. In particular, in long-term contracts, such as project financing or debt-restructuring arrangements, a requirement that the assignor would have to obtain the assignee's consent to every little contract modification could slow down the operations while creating an unwelcome burden for the assignee. This problem would normally not arise, since in practice parties tend to resolve such issues through an

agreement as to which types of modifications require the assignee's consent. In the absence of such an agreement or in the case of breach of such an agreement by the assignor, paragraph 2 would provide an adequate degree of protection to the debtor.

28. Paragraph 3 is intended to preserve any right the assignee may have under other law as against the assignor if a modification of the original contract violates an agreement between the assignor and the assignee. This means that, if, under article 22, a modification is effective as against the assignee without its consent, the debtor is discharged by paying in accordance with the contract as modified. The assignee, however, retains any remedies it might have against the assignor under the applicable law, if the modification is in breach of an agreement between the assignor and the assignee (e.g. the assignee may claim the balance of the original receivable and compensation for any additional damage suffered).

Article 23
Recovery of payments

Without prejudice to the law governing the protection of the debtor in transactions made for personal, family or household purposes in the State in which the debtor is located, failure of the assignor to perform the original contract does not entitle the debtor to recover from the assignee a sum paid by the debtor to the assignor or the assignee.

References

A/CN.9/420, paras. 145-148; A/CN.9/432, paras. 239-244; A/CN.9/434, paras. 94 and 213-215; A/CN.9/447, paras. 136-139; A/CN.9/456, paras. 207 and 208; A/CN.9/466, paras. 143 and 144; and A/CN.9/486, paras. 37-38.

Commentary

29. The main purpose of article 23 is to protect the assignee from a claim by the debtor for the recovery of payments made before performance of the original contract by the assignor. If the assignor does not perform, the debtor may refuse to pay the assignee (see article 20). If, however, the debtor pays the assignee before obtaining performance by the assignor, the debtor may not recover from the assignee the sums paid but is left with any remedies available under the applicable law against the assignor. There is one exception to this rule. If the debtor is a consumer, any right of the debtor to declare the original contract avoided or to recover from the assignee any payments made is not affected (for consumer receivables and consumer protection, see A/CN.9/489, paras. 36, 103, 132; see also para. 21 above). In particular, article 23 does not introduce the exceptions provided in article 10 of the Ottawa Convention in the case of unjust enrichment or bad faith on the part of the assignee. Such exceptions that operate as a guarantee by the assignee that the assignor will perform the original contract may be appropriate in the specific factoring situations addressed in the Ottawa Convention. However, they were considered to be inappropriate in the context of the wide range of financing or service transactions covered by the draft Convention.

Section III
Other parties

Article 24 Law applicable to competing rights

1. With the exception of matters that are settled elsewhere in this Convention and subject to articles 25 and 26:

(a) With respect to the right of a competing claimant, the law of the State in which the assignor is located governs:

(i) The characteristics and priority of the right of an assignee in the assigned receivable; and

(ii) The characteristics and priority of the right of the assignee in proceeds that are receivables whose assignment is governed by this Convention[;][2]

(b) With respect to the right of a competing claimant, the characteristics and priority of the right of the assignee in proceeds described below are governed by:

(i) In the case of money or negotiable instruments not held in a bank account or through a securities intermediary, the law of the State in which such money or instruments are located;

(ii) In the case of investment securities held through a securities intermediary, the law of the State in which the securities intermediary is located;

(iii) In the case of bank deposits, the law of the State in which the bank is located[; and

(iv) In the case of receivables whose assignment is governed by this Convention, the law of the State in which the assignor is located].

[(c) The existence and characteristics of the right of a competing claimant in proceeds described in paragraph 1 (b) of this article are governed by the law indicated in that paragraph]].

2. For the purposes of this article and article 31, the characteristics of a right are:

(a) Whether it is a personal or property right; and

(b) Whether or not it is security for indebtedness or other obligation.

References

A/CN.9/420, paras. 149-164; A/CN.9/432, paras. 245-260; A/CN.9/434, paras.238-258; A/CN.9/445, paras. 18-29 and 30-40; A/CN.9/455, paras. 18-34; A/CN.9/456, paras. 209-213; A/CN.9/466, paras. 20-24 and 32-35; and A/CN.9/486, paras. 39-63.

Commentary

Law applicable

30. Traditionally, priority issues have been submitted to the law of the location (*lex situs*) of the receivable. Departing from that approach, article 24 subjects priority issues to the law of the assignor's location. The traditional rule is no longer regarded as a workable or efficient rule and, in any case, there is no universal agreement on where a receivable is located. In the increasingly common case of a global assignment of present and future receivables, application of the law of the *situs* of the receivable fails to yield a single governing law. It also exposes prospective assignees to the burden of having to determine the notional *situs* of each receivable separately. Application of the law governing the receivable or of the law chosen by the parties produces similar results. Different priority rules would govern priority with regard to the various receivables in a pool of receivables. In the case of future receivables, the parties would not be able to determine with any certainty the law applicable to priority, a factor that might defeat a transaction or, at least, raise the cost of credit. Application of the law chosen by the assignor and the assignee in particular could allow the assignor, acting in collusion with a claimant in order to

[2] Pending final determination by the Commission of whether the bracketed language (i.e. paragraph 1 (b) and (c)) will be retained, the commentary does not cover that language.

obtain a special benefit, to determine the priority among several claimants. Such a result would run counter to the principle of party autonomy as limited in article 6. In addition, the law chosen by the parties would be completely unworkable in the case of several assignments of the same receivables either by the same or by different assignors, since different laws could apply to the same priority conflicts.

31. While article 24 departs from the traditional approach in order to accommodate the most common practices that involve bulk assignments of all present and future receivables, it makes no exception for assignments of single, existing receivables. Introducing a different priority rule with regard to the assignment of such receivables would detract from the certainty achieved in article 24. If the rule were to focus on the value of the assigned receivable, it would create other problems. First, it would be difficult to clearly define "high-value" receivables. Moreover, in a bulk assignment containing both "high-value" and "low-value" receivables, priority would be subject to different laws. Such a situation could inadvertently result in facilitating the manipulation of the applicable priority rule by the parties.

32. In the case of more than one place of business, location is defined by reference to the place of central administration of the assignor (see article 5 (h)). Accordingly, application of the law of the assignor's location will result in the application of the law of a single jurisdiction and one that can be easily determined at the time of the assignment. It will thus eliminate the difficulties mentioned above. In particular, the location of the assignor as a connecting factor presents the advantage that it provides a single point of reference; it can be ascertained at the time of even a bulk assignment of future receivables; it would be suitable even for legal systems in which registration is practised; and it would result in the application of the law of the jurisdiction in which any main insolvency proceeding with regard to the assignor would be most likely to commence. This last aspect of the application of the law of the assignor's location is essential, since it appropriately addresses the issue of the relationship between the draft Convention and the applicable insolvency law.

33. With respect to insolvency, the thrust of article 24 is to ensure that, in most cases, the law governing priority under article 24 and the law governing the insolvency of the assignor are the laws of one and the same jurisdiction (the assignor's main jurisdiction; see, for example, articles 2 (b) and 16, paragraph 3, of the UNCITRAL Model Law on Cross-Border Insolvency). In such a situation, any conflict between the draft Convention and the applicable insolvency law would be resolved by the rules of law of that jurisdiction. If an insolvency proceeding is commenced in a State other than the State of the assignor's main jurisdiction, article 25 applies. In such a case, a priority rule could be set aside if is manifestly contrary to the public policy of the forum; and the priority of special preferential rights would not be affected.

Limitations

34. Article 25 introduces two limitations to the law applicable under article 24 (see paras. 38-40). Beyond those limitations, there are other limitations. As a private international law provision, article 24 does not settle priority conflicts. It merely refers them to the law of the assignor's location. If that law has adequate rules, certainty would be enhanced. If that law does not have adequate rules, certainty would not be obtained. For that reason, different substantive law priority rules are offered in the annex for States to choose from (as to the options available to States and their effects, see article 42). Another limitation to article 24 is that, for it to apply, the assignor has to be located in a Contracting State at the time of the conclusion of the contract of assignment. In most cases, this limitation would cause no problems. However, if the assignor, after making an assignment, relocates and makes another assignment in another country, under article 24, there would be two laws of the assignor's location. This matter was deliberately not addressed, since it was thought that it would arise only in very exceptional situations. Yet another limitation is that, for article 24 to apply, the forum has to be in a Contracting State. To the extent that the forum cannot be predicted at the time of an assignment (see para. 39), certainty may not be obtainable.

Scope

35. The opening words of article 24 are intended to ensure that article 24 would apply only to matters that are not settled by way of a substantive law rule of the draft Convention. For example, the general effectiveness of an assignment of future receivables is addressed in article 9. Accordingly, an assignment is effective as between the assignor and the assignee, and as against the debtor, even in the absence of a notification or registration (if, under national law, notification or registration is a condition of material validity). Issues of formal validity are addressed in article 8 and issues of material validity other than those addressed in articles 9 to 12 are left to law applicable outside the draft Convention. The words "subject to articles 25 and 26" are intended to ensure that, in the case of conflict, articles 25 and 26 would prevail. For example, matters in article 24 are referred to the law of the assignor's location unless a rule of that law is manifestly contrary to the public policy of the forum and subject to certain super-priority rights to which priority is given under the law of the forum.

36. The chapeau of subparagraph (a) is aimed at ensuring that the characteristics of a right are referred to the law of the assignor's location only in the case of a priority conflict. The term "characteristics" is defined in paragraph 2, while the term "priority" is defined in article 5 (g). The term "competing claimant" is defined in article 5 (m) so as to ensure that all possible priority conflicts are referred to the law of the assignor's location. Conflicts between assignees of the same receivables from the same assignor are covered. Also covered are conflicts between a Convention and a non-Convention assignee (e.g. between a foreign and a domestic assignee of domestic receivables). Equally covered are conflicts between an assignee and a creditor of the assignor or the administrator in the insolvency of the assignor. Also covered are conflicts, in the case of subsequent assignments, between any assignee and the assignor's creditors or the administrator in the insolvency of the assignor (no conflict of priority can arise as between assignees in a chain of assignments). However, a conflict between an assignee in a Contracting State and an assignee in a non-Contracting State is not covered (as to conflicts arising between parties to assignments made before and after a declaration takes effect, or the draft Convention enters into force or is denounced, see articles 43, paragraph 7, 45, paragraph 4, and 46, paragraph 4 respectively).

37. Issues arising in the case of insolvency of the assignee are beyond the scope of the draft Convention and are not addressed, unless the assignee makes a subsequent assignment and becomes an assignor. The draft Convention is not intended to address issues arising in the context of the debtor's insolvency either. It is assumed that normally the assignee would have in the receivables the same rights that the assignor would have in the case of insolvency of the debtor.

Article 25
Public policy and preferential rights

1. The application of a provision of the law of the State in which the assignor is located may be refused by a court or other competent authority only if that provision is manifestly contrary to the public policy of the forum State.

2. In an insolvency proceeding commenced in a State other than the State in which the assignor is located, any preferential right that arises, by operation of law, under the law of the forum State and is given priority status over the rights of an assignee in insolvency proceedings under the law of that State may be given priority notwithstanding article 24. A State may deposit at any time a declaration identifying any such preferential right.

References

A/CN.9/434, paras. 216-237; A/CN.9/445, paras. 41-44; A/CN.9/455, paras. 35-40; A/CN.9/456, paras. 214-222; A/CN.9/466, paras. 36-41 and A/CN.9/486, paras. 64-65.

Commentary

Public policy

38. A priority dispute will typically arise in the State of the assignor's location. In such a case, if that State is a Contracting State, the substantive law priority rule of the forum will be the law applicable pursuant to article 24. However, a priority dispute may also arise in a State other than the State of the assignor's location (e.g. a State where the assignor has assets or the State of the debtor's location). In such a case, a conflict may arise between a priority rule of the law of the State of the assignor's location and a priority rule of the forum. In principle, this conflict should be resolved in favour of the priority rule of the law applicable. Otherwise, the certainty achieved by any applicable law rule would be severely undermined or even negated. In the case of article 24, such a result could have a negative impact on the availability and the cost of credit on the basis of receivables. However, in private international law texts exceptions are typically introduced to preserve the public policy and certain mandatory law rules of the forum. The main purpose of article 25 is to introduce and, at the same time, to limit such exceptions.

39. Under paragraph 1, a court or other competent authority in the forum may refuse to apply a provision of the law of the State in which the assignor is located if that provision is manifestly contrary to the public policy of the forum. The public policy exception is qualified by the notion "manifestly contrary" (used also in article 33; see para. 53). This notion is used in international texts (see, for example, article 6 of the UNCITRAL Model Law on Cross-Border Insolvency) as a qualification of public policy. The purpose of such a qualification is to emphasize that public policy exceptions should be interpreted restrictively and paragraph 1 should be invoked only in exceptional circumstances concerning matters of fundamental importance for the forum (see Guide to Enactment of the Model Law, para. 89). Public policy in this sense, as it is used in an international context, normally permits rejection of the offensive provision of the otherwise applicable foreign law (e.g. a provision of law of the relevant foreign State, which gives overriding priority to the tax claims of the government of that State). It is not intended to result in the application of a rule of the law of the forum. It should be noted that it is the application of a relevant provision of the applicable law to a particular case, and not the applicable law in general, that needs to be manifestly contrary to the public policy of the forum.

Mandatory law

40. Article 25 does not contain a general exception as to the mandatory rules of the forum, since it is not intended to permit the substitution of the priority rules of the forum or another State for the priority rules of the applicable law (this approach is explicit in article 32, see para 52). Such an approach could seriously undermine the certainty achieved by article 24, since most priority rules of the forum or an another State would normally be mandatory law rules. However, in order to make the draft Convention more acceptable to States, paragraph 2 introduces a limited exception. In an insolvency proceeding opened in a State other than the State of the assignor's location, the forum may apply its own priority rule and give priority to super-priority rights that arise by operation of law of the forum, provided that they would have priority over the rights of an assignee under the law of the forum. The exception is stated in permissive terms ("may") to signal that the forum court should take a restrained approach, preserving forum preferential rights only if the policy underlying the preference is clearly engaged on the particular facts. Moreover, the exception in paragraph (2) applies only in the context of insolvency proceedings under the law of the forum. Non-consensual preferential rights that operate under forum law outside of the formal insolvency context are not preserved. Furthermore, paragraph 2 permits (but does not oblige) a State to list in a declaration the categories of non-consensual super-priority rights that will prevail under the substantive law of that State over the rights of an assignee pursuant to paragraph 2. This possibility for declarations is intended to enhance certainty by providing a simple disclosure mechanism for assignees to know which super-priority rights would prevail over their rights without having to investigate the substantive law of the relevant Contracting State.

Special insolvency rights

41. Article 25 makes no reference to special rights of creditors of the assignor or of the insolvency administrator that may prevail over the rights of an assignee under law governing insolvency. The reason is that priority established under the draft Convention is not intended to interfere with such special rights. Such special rights include, but are not limited to, any right of creditors of the assignor or the insolvency administrator to initiate an action to avoid or otherwise render ineffective an assignment as a fraudulent or preferential transfer. They also include any right of the insolvency administrator to initiate an action to avoid or otherwise render ineffective, an assignment of receivables that have not arisen at the time of the commencement of the insolvency proceeding; to encumber the assigned receivables with the expenses of the insolvency administrator in performing the original contract; or to encumber the assigned receivables with the expenses of the insolvency administrator in maintaining, preserving or enforcing the receivables at the request and for the benefit of the assignee. If the assigned receivables constitute security for indebtedness or other obligations, the special rights protected include any rights existing under insolvency rules or procedures governing the insolvency of the assignor that permit the insolvency administrator to encumber the assigned receivables; provide for a stay of the right of individual assignees or creditors of the assignor to collect the receivables during the insolvency proceeding; permit the substitution of the assigned receivables for new receivables of at least equal value; or provide for the right of the insolvency administrator to borrow using the assigned receivables as security to the extent that their value exceeds the obligations secured.

Article 26
Special proceeds rules

1. If proceeds are received by the assignee, the assignee is entitled to retain those proceeds to the extent that the assignee's right in the assigned receivable had priority over the right of a competing claimant in the assigned receivable.

2. If proceeds are received by the assignor, the right of the assignee in those proceeds has priority over the right of a competing claimant in those proceeds to the same extent as the assignee's right had priority over the right in the assigned receivable of that claimant if:

(a) The assignor has received the proceeds under instructions from the assignee to hold the proceeds for the benefit of the assignee; and

(b) The proceeds are held by the assignor for the benefit of the assignee separately and are reasonably identifiable from the assets of the assignor, such as in the case of a separate deposit account containing only cash receipts from receivables assigned to the assignee.

References

A/CN.9/447, paras. 63-68; A/CN.9/456, paras. 160-167; A/CN.9/466, paras. 42-53; and A/CN.9/486, paras. 66-67.

Commentary

42. The purpose of article 26 is to facilitate practices in which payment of the receivable is made to the assignee or to the assignor as an agent of the assignee (e.g. undisclosed invoice discounting and securitization). At the same time, by indicating a way in which assignees may obtain priority with respect to proceeds, article 26 may well facilitate other practices to the extent that they may be structured to meet the criteria of article 26. Paragraph 1 gives priority to an assignee with respect to the proceeds, if the assignee has received payment of and has priority with respect to the assigned receivable. The implicit limitation is that the assignee may not retain more than the value of its receivable. Paragraph 2 gives priority to an assignee with

respect to proceeds, if the assignee has priority with respect to the assigned receivable and if the assignor receives payment on behalf of the assignee and those proceeds are reasonably identifiable from the assignor's assets.

Article 27
Subordination

An assignee entitled to priority may at any time subordinate its priority unilaterally or by agreement in favour of any existing or future assignees.

References

A/CN.9/445, para. 29; A/CN.9/455, para. 31; A/CN.9/456, para. 210; and A/CN.9/486, paras. 68-69.

Commentary

43. Article 27 is intended to recognize the interest of the parties involved in a conflict in negotiating and relinquishing priority in favour of a subordinate claimant where commercial considerations so warrant. In order to afford maximum flexibility and to reflect prevailing business practices, article 27 makes it clear that a valid subordination need not take the form of a direct subordination agreement between the assignee with priority and the beneficiary of the subordination agreement. It can also be effected unilaterally, for instance, by means of an undertaking of the first ranking assignee to the assignor, empowering the assignor to make a second assignment ranking first in priority. The term "unilaterally" is further intended to clarify that the beneficiary of the subordination (the second assignee) need not offer anything in exchange for the priority granted by the unilateral subordination. In referring to "agreement" in general, article 27 is intended to validate a subordination clause in the contract of assignment or in a separate agreement. Furthermore, article 27 clarifies that an effective subordination need not specifically identify the intended beneficiary or beneficiaries ("any existing or future assignees") and can instead employ generic language. Such unilateral subordination may take place in an assignment between entities in the same corporate group or may be a service offered by a lender to a borrower for commercial considerations.

Chapter V
Autonomous conflict-of-laws rules

Article 28
Application of chapter V

The provisions of this chapter apply to matters that are:

(a) Within the scope of this Convention as provided in article 1, paragraph 4; and

(b) Otherwise within the scope of this Convention but not settled elsewhere in it.

References

A/CN.9/420, paras. 185-187; A/CN.9/445, paras. 52-55; A/CN.9/455, paras. 67-73; A/CN.9/466, paras. 145-149; and A/CN.9/486, paras. 70-75

Commentary

44. Article 28 deals with the scope and the purpose of chapter V. Under subparagraph (a), chapter V may apply even if the assignor (or, with respect to the application of article 30, the

debtor) is not located in a Contracting State. In such a case, chapter V would introduce a second layer of unification, since it would apply to transactions falling outside the scope of the provisions of the draft Convention other than those in chapter V. Under subparagraph (b), chapter V would apply in the same way as, and supplement, the provisions of the draft Convention other than those in chapter V.

Article 29
Law applicable to the mutual rights and obligations of the assignor and the assignee

1. The mutual rights and obligations of the assignor and the assignee arising from their agreement are governed by the law chosen by them.

2. In the absence of a choice of law by the assignor and the assignee, their mutual rights and obligations arising from their agreement are governed by the law of the State with which the contract of assignment is most closely connected.

References

A/CN.9/420, paras. 188-196; A/CN.9/445, paras. 52-74; A/CN.9/455, paras. 67-119; A/CN.9/466, paras. 150-153; and A/CN.9/486, paras. 77-79.

Commentary

45. Article 29 reflects the principle of party autonomy with respect to the law applicable to the contract of assignment, which is widely recognized but not universally accepted. In view of the fact that paragraph 1 does not require an explicit choice, even an implicit choice of law would be sufficient. Under paragraph 1, the law chosen by the parties governs the purely contractual aspects of the contract of assignment. Such contractual aspects include the conclusion and the substantive validity of the contract of assignment, the interpretation of its terms, the assignee's obligation to pay the price or to render the promised credit, the existence and effect of representations as to the validity and enforceability of the receivable. With respect to assignments falling within the ambit of the provisions of the draft Convention other than those in chapter V, paragraph 1 is not intended to cover the substantive validity aspects addressed in the draft Convention (or other such aspects, such as capacity or authority to act). In the case of such assignments, paragraph 1 does not cover either the proprietary aspects of assignment addressed in the draft Convention (for this reason, reference is made to "the agreement" to assign as opposed to "the assignment" itself; for this distinction, see A/CN.9/489, para. 25). If the contract of assignment is just a clause in the financing contract, paragraph 1 does not cover the financing contract either, unless the parties agree otherwise.

46. Paragraph 2 is intended to deal with the exceptional situations in which the parties have not agreed (explicitly or implicitly) on the law applicable to the contract of assignment or in which the parties have agreed but their agreement is later found to be invalid. It refers to the closest-connection test, which may typically result in the application of the law of the assignor's location or of the law of the assignee's location.

Article 30
Law applicable to the rights and obligations of the assignee and the debtor

The law governing the original contract determines the effectiveness of contractual limitations on assignment as between the assignee and the debtor, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.

References

A/CN.9/420, paras. 197-200; A/CN.9/445, paras. 65-69; A/CN.9/455, paras. 92-104 and 117; A/CN.9/466, paras. 154-158; and A/CN.9/486, paras. 80-84.

Commentary

47. In line with the principle of debtor protection, article 30 refers issues arising in the context of the relationship between the assignee and the debtor to the law governing the receivable, which, in the case of contractual receivables, is the law governing the original contract from which they arise. Reference is made to the law of the original contract, since, unlike article 12, paragraph 2 of the Convention on the Law Applicable to Contractual Obligations (Rome, 1980; "the Rome Convention) on which article 30 was modelled and which may apply to non-contractual rights, article 30 covers only contractual receivables (see article 2). No reference is made to how the law applicable to the original contract should be determined. Such elaborate rules are not necessary in a chapter that is intended to establish certain general principles, without addressing all assignment-related private international law issues. In any case, it would be inappropriate to attempt to determine the law governing the wide variety of contracts that might be at the origin of a receivable (e.g. contracts of sale, insurance contracts or contracts relating to financial markets operations).

48. Article 30 also applies to transaction set-off (i.e. a cross-claim arising out of the original contract or a closely related contract), since a transaction set-off would fall under the "relationship between the assignee and the debtor". Independent set-off (i.e. claims arising from sources that are unrelated to the original contract), however, is not covered. Such claims may arise from a variety of sources (e.g. a separate contract between the assignor and the debtor, a rule of law or a judicial or arbitral decision). Their availability and the conditions governing availability (e.g. liquidity, same currency and maturity) are left to other law, which is not specified in the draft Convention.

49. Article 30 also covers contractual, but not statutory, assignability as an issue relating to payment by and discharge of the debtor. This means that, if the provisions of the draft Convention outside chapter V do not apply with regard to the debtor, the effects of a breach of a contractual limitation on the relationship between the assignee and the debtor are left to the law governing the original contract. If those provisions apply, the assignment made in breach of a contractual limitation is effective as against the debtor (see article 11, paragraph 1) and the debtor will not have a defence as against the assignee (see article 20, paragraph 3).

Article 31
Law applicable to competing rights

1. With the exception of matters that are settled elsewhere in this Convention and subject to articles 25 and 26:

(a) With respect to the right of a competing claimant, the law of the State in which the assignor is located governs:

(i) The characteristics and priority of the right of an assignee in the assigned receivable; and

(ii) The characteristics and priority of the right of the assignee in proceeds that are receivables whose assignment is governed by this Convention[;

(b) With respect to the right of a competing claimant, the characteristics and priority of the right of the assignee in proceeds described below are governed by:

(i) In the case of money or negotiable instruments not held in a bank account or through a securities intermediary, the law of the State in which such money or instruments are located;

(ii) In the case of investment securities held through a securities intermediary, the law of the State in which the securities intermediary is located;

(iii) In the case of bank deposits, the law of the State in which the bank is located[; and

(iv) In the case of receivables whose assignment is governed by this Convention, the law of the State in which the assignor is located].

[(c) The existence and characteristics of the right of a competing claimant in proceeds described in paragraph 1 (b) of this article are governed by the law indicated in that paragraph]].

2. In an insolvency proceeding commenced in a State other than the State in which the assignor is located, any preferential right that arises, by operation of law, under the law of the forum State and is given priority status over the rights of an assignee in insolvency proceedings under the law of that State may be given priority notwithstanding paragraph 1 of this article.

References

A/CN.9/445, paras. 70-74; A/CN.9/455, paras. 105-110; A/CN.9/466, paras. 159 and 160; and A/CN.9/486, paras. 85-86.

Commentary

50. While article 31 reproduces the rules in articles 24 and 25, it has a different scope in that it may apply irrespective of whether the assignor is located in a Contracting State (see articles 1, paragraph 4, and 28 (a)).

Article 32
Mandatory rules

1. Nothing in articles 29 and 30 restricts the application of the rules of the law of the forum State in a situation where they are mandatory, irrespective of the law otherwise applicable.

2. Nothing in articles 29 and 30 restricts the application of the mandatory rules of the law of another State with which the matters settled in those articles have a close connection if and in so far as, under the law of that other State, those rules must be applied irrespective of the law otherwise applicable.

References

A/CN.9/455, paras. 111-117; A/CN.9/466, paras. 161 and 162; and A/CN.9/486, paras. 87-88.

Commentary

51. Paragraph 1 is intended to reflect a generally accepted principle in private international law according to which mandatory law rules of the forum may be applied irrespective of the law otherwise applicable (see article 7, paragraph 2, of the Rome Convention and article 11 of the Inter-American Convention on the Law Applicable to International Contracts (Mexico City, 1994; "the Mexico City Convention")). Mandatory law in this context refers to law of fundamental importance, such as consumer protection law or criminal law (*loi de police*) and not merely to law that cannot be derogated from by agreement. Paragraph 2 introduces a different rule, namely, that a court in a Contracting State may apply not its own law or the law applicable

under articles 29 and 30 but the law of a third country to which the matters settled in those provisions have a close connection (see article 7, paragraph 1, of the Rome Convention).

52. The scope of article 32 is limited to cases involving the law applicable to the contract of assignment and to the relationship between the assignee and the debtor. This means that the law applicable to priority issues may not be set aside as contrary to mandatory law rules of the forum or another State. In this respect, article 31, paragraph 2, under which a priority rule of the law applicable may be set aside for the purpose of protecting, for example, a relative right of the forum State for taxes, was considered to be sufficient. Such a limitation of the mandatory-law exception was thought to be justified on the grounds that priority rules are of a mandatory nature and setting them aside in favour of the mandatory rules of the forum or another State would inadvertently result in creating uncertainty as to the law applicable to priority and thus have a negative impact on the availability and the cost of credit.

Article 33
Public policy

With regard to matters settled in this chapter, the application of a provision of the law specified in this chapter may be refused by a court or other competent authority only if that provision is manifestly contrary to the public policy of the forum State.

References

A/CN.9/455, paras. 118 and 119; A/CN.9/466, paras. 163 and 164; and A/CN.9/486, paras. 89-90.

Commentary

53. Article 33 reflects a standard provision in private international law texts (see, for example, article 16 of the Rome Convention and article 18 of the Mexico City Convention). The purpose of this provision is to make it possible for States to set aside a rule of the applicable law that, as applied in a specific case, is "manifestly contrary" to the international public policy of the forum State (on the meaning of the notion "manifestly contrary", see para. 40).

Chapter VI
Final provisions

Article 34
Depositary

The Secretary-General of the United Nations is the depositary of this Convention.

References

A/CN.9/455, paras. 124 and 125; and A/CN.9/486, paras. 91-92.

Commentary

54. The Treaty Section of the Office of Legal Affairs of the United Nations, located at United Nations Headquarters in New York, performs the depositary functions of the Secretary-General. Treaties, related declarations deposited with the depositary, as well as lists of Contracting States, are accessible through the home page of the Treaty Section on the World Wide Web (http://www.un.org/depositary). Treaties based on texts developed by the Commission are accessible through the UNCITRAL website, along with a wide range of relevant information, including status of texts (http://www.uncitral.org). Printed texts may be obtained from the

Treaty Section and the International Trade Law Branch, as well as from a variety of other sources, including United Nations depositary libraries.

Article 35
Signature, ratification, acceptance, approval, accession

1. This Convention is open for signature by all States at the Headquarters of the United Nations in New York, until [...].

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open to accession by all States that are not signatory States as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

References

A/CN.9/455, paras. 141 and 142; and A/CN.9/486, paras. 93-94.

Commentary

55. Article 35 is standard treaty provision. The period during which the Convention would be opened for signature by States remains to be determined.

Article 36
Application to territorial units

1. If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at any time, declare that this Convention is to extend to all its territorial units or only one or more of them, and may at any time substitute another declaration for its earlier declaration.

2. Such declarations are to state expressly the territorial units to which this Convention extends.

3. If, by virtue of a declaration under this article, this Convention does not extend to all territorial units of a State and the assignor or the debtor is located in a territorial unit to which this Convention does not extend, this location is considered not to be in a Contracting State.

4. If a State makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

References

A/CN.9/455, paras. 143 and 144; A/CN.9/486, paras. 95-96.

Commentary

56. Article 36 is intended to ensure that a federal State may adopt the draft Convention, even if, for any reason, it does not wish to or cannot, under internal law, have it apply to all its territorial units. Such a right is particularly important for States with more than one legal system. The declaration may be made at any time, including before or after ratification, approval or accession (reference is made to a "State" and not to a "Contracting State", since a declaration may be made

by a signatory State). The effect of a declaration under article 36 is that a party located in a territorial unit, to which the draft Convention is not to be applied by virtue of the declaration, is not considered to be located in a Contracting State (paragraph 3). If that party is the assignor, the draft Convention would not apply at all (with the exception of chapter V where the forum is in a Contracting State that has not opted out of chapter V). If that party is the debtor, the provisions of the draft Convention dealing with the rights and obligations of the debtor would not apply (unless the law governing the original contract is the law of a Contracting State or a territorial unit to which the draft Convention is to apply). The rule in article 5 (h) as to multiple places of business applies if "the assignor or the assignee has places in more than one State". For the purpose of article 36, it should be applied by analogy to cases in which there are multiple places of business in different entities of a federal State.

[Article 37
Applicable law in territorial units

If a State has two or more territorial units whose law may govern a matter referred to in chapters IV and V of this Convention, a reference in those chapters to the law of a State in which a person or property is located means the law applicable in the territorial unit in which the person or property is located, including rules that render applicable the law of another territorial unit of that State. Such a State may specify by declaration at any time how it will implement this article.]

References

A/CN.9/486, paras. 96-97.

Commentary

57. Article 37, which appears in square brackets pending final determination by the Commission of whether it should be retained, is intended to deal with applicable law issues in the case of a federal State (the commentary will be written once the article is finalized).

Article 38
Conflicts with other international agreements

1. This Convention does not prevail over any international agreement that has already been or may be entered into and that contains provisions concerning the matters governed by this Convention, provided that the assignor is located at the time of the conclusion of the contract of assignment in a State party to such agreement or, with respect to the provisions of this Convention that deal with the rights and obligations of the debtor, at the time of the conclusion of the original contract, the debtor is located in a State party to such agreement or the law governing the original contract is the law of a State party to such agreement.

2. Notwithstanding paragraph 1 of this article, this Convention prevails over the Unidroit Convention on International Factoring ("the Ottawa Convention"). If, at the time of the conclusion of the original contract, the debtor is located in a State party to the Ottawa Convention or the law governing the original contract is the law of a State party to the Ottawa Convention and that State is not a party to this Convention, nothing in this Convention precludes the application of the Ottawa Convention with respect to the rights and obligations of the debtor.

References

A/CN.9/445, paras. 52-55, 75, 76 and 201-203; A/CN.9/455, paras. 67-73 and 126-129; A/CN.9/456, paras. 232-239; A/CN.9/466, paras. 192-195; and A/CN.9/486, paras. 98-108.

Commentary

58. Reflecting generally acceptable principles as to conflicts among international legislative texts (see, e.g., article 30 of the Vienna Convention on the Law of Treaties, 1969 ("the Vienna Convention"); and article 90 of the United Nations Sales Convention), paragraph 1 gives precedence to other texts that contain provisions that deal with matters covered by the draft Convention. Paragraph 2 takes a different approach with regard to the Ottawa Convention. The main reason for this approach is that the draft Convention is more comprehensive both in the scope and in the issues covered. The second sentence of paragraph 2 is intended to ensure that the application of the Ottawa Convention is not affected if a factoring contract is within the territorial scope of application of the Ottawa Convention but not of the draft Convention.

59. In view of the fact that the draft Convention contains private international law provisions, conflicts may arise with private international law texts, such as the Rome Convention and the Mexico City Convention. However, there are no conflicts with the Mexico City Convention, which addresses the law applicable to contracts in general (not assignment in particular) in a way that is consistent with article 29 of the draft Convention. Any conflicts between article 12 of the Rome Convention and articles 29 and 30 of the draft Convention are minimal, since those articles are almost identical with article 12 of the Rome Convention. Furthermore, normally, no conflicts should arise between article 12 of the Rome Convention and article 31 of the draft Convention, since, according to the prevailing view, article 12 of the Rome Convention does not address this matter. However, in the literature and in case law, the view has been expressed that article 12 of the Rome Convention addresses issues of priority, either in paragraph 1 (the law chosen by the parties) or in paragraph 2 (the law governing the receivable). The Commission has taken a different approach (the law of the assignor's location). In order to avoid any conflict with the Rome Convention, article 39 provides that a State may opt out of chapter V. As a result, if all States parties to the Rome Convention opt out of chapter V, no conflict would arise. However, an opt-out of articles 24 to 26 is not allowed. Therefore, conflicts may arise between articles 24 to 26 of the draft Convention and article 12 of the Rome Convention. Article 21 of the Rome Convention would not provide an answer to the question of which text would prevail, since it provides that the Rome Convention "shall not prejudice the application of international conventions". The matter would, therefore, be left to general principles of treaty law, under which the latest or the more specific text would prevail.

60. The European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings would refer conflicts of priority between an assignee and an insolvency administrator to the place where the insolvency proceeding is opened (see article 4). In the case of a main insolvency proceeding, that place is the place where the insolvent debtor (i.e. the assignor in the terminology of the draft Convention) has the centre of its main interests (see article 3, paragraph 1). If the assignor has just one place of business, that place is going to be the centre of its main interests and, as a result, both the draft Convention and the Regulation would refer to the same law. If the assignor has more than one place of business, both the draft Convention and the Regulation would refer to the law of the assignor's centre of main interests (as to the notion of central administration, see A/CN.9/489, para. 68).

61. In the case of a secondary insolvency proceeding, the Regulation would refer priority issues to the place where the assignor has an establishment, i.e. non-transitory economic activities (see article 3, paragraph 2, and 2 (h)), while the draft Convention would refer to the law of the assignor's main interests. The draft Convention goes a long way in addressing that conflict (which concerns all States and not only member States of the European Union). A priority rule that is manifestly contrary to the law of the forum can be set aside and super-priority rights with priority under the law of the forum are not affected (see article 25). Equally unaffected remain any special insolvency rights, such as those described in article 4, paragraph 2, of the Regulation (see para. 41 above) . The Regulation also reduces the potential for any conflict in providing that the opening of an insolvency proceeding in one State member of the European Union does

not affect rights *in rem*, rights of set-off or rights arising from a retention of title clause with respect to assets located in another member State (see articles 5-7 and 2 (g)). In any case, if a conflict arises, it should be resolved in favour of the regulation by virtue of article 38, paragraph 1 (the scope of which may need to be expanded).

62. Conflicts may arise with the preliminary draft Convention on International Interests in Mobile Equipment, currently being prepared by a group of experts in the context of the International Civil Aviation Organization ("ICAO"), UNIDROIT and other organizations. This preliminary draft Convention is intended to apply to certain types of high-value mobile equipment. An assignment of the security interest in such equipment transfers also the principal, secured obligation. An assignee registering this assignment with the international equipment-specific register of the preliminary draft Convention would prevail over an assignee of the principal obligation. Such an assignee of the principal obligation (e.g. an assignee under the draft Convention) could not register or obtain priority. Under article 38, paragraph 1, any conflicts with the preliminary draft Convention would be resolved in favour of the application of the preliminary draft Convention. The same result would presumably be reached, even in the absence of article 38, since according to general principles of treaty law the later or more specific text would prevail.

Article 39
Declaration on application of chapter V

A State may declare at any time that it will not be bound by chapter V.

References

A/CN.9/455, paras. 72 and 148; A/CN.9/466, paras. 196 and 197; and A/CN.9/486, paras. 109-111.

Commentary

63. In order to make the draft Convention more acceptable to States that do not need chapter V (e.g. because they are parties to other private international law texts, such as the Rome Convention), article 39 allows States to opt out (see also article 1, paragraph 4). The possibility for an opt-out, rather than an opt-in, is intended to make clear that chapter V forms an integral part of the draft Convention.

Article 40
Limitations relating to Governments and other public entities

A State may declare at any time that it will not be bound or the extent to which it will not be bound by articles 11 and 12 if the debtor or any person granting a personal or property right securing payment of the assigned receivable is located in that State at the time of the conclusion of the original contract and is a Government, central or local, any subdivision thereof, or an entity constituted for a public purpose. If a State has made such a declaration, articles 11 and 12 do not affect the rights and obligations of that debtor or person. A State may list in a declaration the types of entity that are the subject of a declaration.

References

A/CN.9/432, para. 117; A/CN.9/455, para. 48; A/CN.9/456, paras. 115 and 116; A/CN.9/466, paras. 107-115; and A/CN.9/486, paras. 112-114.

Commentary

64. Receivables owed by a State or other public entity are often not assignable by law. The draft Convention does not affect such statutory limitations on assignment (see article 9, paragraph 3). However, in some States, such statutory limitations are not normal practice and therefore sovereign debtors often resort to contractual limitations on assignment. In order to make the draft Convention more acceptable to such States, article 40 allows them to ensure the effectiveness of such contractual limitations with respect to sovereign debtors by making a declaration. If a declaration is made by the State in which a sovereign debtor is located at the time of the conclusion of the original contract, articles 11 and 12 do not affect the rights of that sovereign debtor. This means that an assignment will be ineffective as against the sovereign debtor, while it remains effective as against the assignor and the assignor's creditors. This approach is based on the assumption that, once the sovereign debtor is protected, there is no reason to invalidate the assignment in general. Preserving the validity of the assignment as between the assignor and the assignee would allow the assignee to obtain priority by meeting the requirements of the law of the assignor's location. Unlike article 6 of the Ottawa Convention, which allows a reservation with regard to any debtor, article 40 allows a reservation only with respect to sovereign debtors. As to public entities, article 40 leaves a wide flexibility to States to determine the types of entities they wish to exclude from the application of articles 11 and 12.

[*Article 41*
Other exclusions

1. A State may declare at any time that it will not apply this Convention to types of assignment or to the assignment of categories of receivables listed in a declaration. In such a case, this Convention does not apply to such types of assignment or to the assignment of such categories of receivables if the assignor is located at the time of the conclusion of the contract of assignment in such a State or, with respect to the provisions of this Convention that deal with the rights and obligations of the debtor, at the time of the conclusion of the original contract, the debtor is located in such a State or the law governing the original contract is the law of such a State.

2. After a declaration under paragraph 1 of this article takes effect:

(a) This Convention does not apply to such types of assignment or to the assignment of such categories of receivables if the assignor is located at the time of the conclusion of the contract of assignment in such a State; and

(b) The provisions of this Convention that affect the rights and obligations of the debtor do not apply if, at the time of the conclusion of the original contract, the debtor is located in such a State or the law governing the receivable is the law of such a State.]

References

A/CN.9/466, paras. 198-201

Commentary

65. With a view to making the draft Convention more acceptable to States that might be concerned with its application to certain present or to future practices, article 41 provides the possibility for States to exclude further practices. Article 41 appears within square brackets pending final determination of whether it should be retained (the commentary will be written once article 41 is finalized).

Article 42
Application of the annex

1. A State may at any time declare that it will be bound by:

(a) The priority rules set forth in section I of the annex and will participate in the international registration system established pursuant to section II of the annex;

(b) The priority rules set forth in section I of the annex and will effectuate such rules by use of a registration system that fulfils the purposes of such rules, in which case, for the purposes of section I of the annex, registration pursuant to such a system has the same effect as registration pursuant to section II of the annex;

(c) The priority rules set forth in section III of the annex;

(d) The priority rules set forth in section IV of the annex; or

(e) The priority rules set forth in articles 7 and 8 of the annex.

2. For the purposes of article 24:

(a) The law of a State that has made a declaration pursuant to paragraph 1 (a) or (b) of this article is the set of rules set forth in section I of the annex;

(b) The law of a State that has made a declaration pursuant to paragraph 1 (c) of this article is the set of rules set forth in section III of the annex;

(c) The law of a State that has made a declaration pursuant to paragraph 1 (d) of this article is the set of rules set forth in section IV of the annex; and

(d) The law of a State that has made a declaration pursuant to paragraph 1 (e) of this article is the set of rules set forth in articles 7 and 8 of the annex.

3. A State that has made a declaration pursuant to paragraph 1 of this article may establish rules pursuant to which assignments made before the declaration takes effect become subject to those rules within a reasonable time.

4. A State that has not made a declaration pursuant to paragraph 1 of this article may, in accordance with priority rules in force in that State, utilize the registration system established pursuant to section II of the annex.

5. At the time a State makes a declaration pursuant to paragraph 1 of this article or thereafter, it may declare that it will not apply the priority rules chosen under paragraph 1 of this article to certain types of assignment or to the assignment of certain categories of receivables.

References

A/CN.9/455, paras. 122 and 130-132; A/CN.9/466, paras. 188-191, 202 and 203; A/CN.9/486, paras. 119-120 and 169.

Commentary

66. Article 42 is intended to list the choices available to States with regard to the annex and the effects of any such choice made by way of a declaration (permitted under article 1, paragraph 5; see A/CN.9/489, para. 24). States have several alternative choices with regard to the annex. These choices are: to adopt the priority rules of section I and the registration system proposed in

section II of the annex (paragraph 1 (a)); to adopt the priority rules of section I and a registration system other than that proposed in section II (paragraph 1 (b)); to adopt the priority rules of section III, section IV or in articles 7 and 8 of the annex; or to apply their own priority rules with the registration system of section II (paragraph 4). The difference between the choices in paragraph 1 and the choice in paragraph 4 is that, a State would not need to make a declaration to exercise the choice given in paragraph 4. Paragraph 2 sets forth the effect of a declaration, namely that the section of the annex to which the assignor's State has opted into is the law of the assignor's location at the time of the conclusion of the contract of assignment. Paragraph 3 deals with transitional application issues, while paragraph 4 permits States to subject different practices to different priority rules.

Article 43
Effect of declaration

1. Declarations made under articles 36, paragraph 1, 37 or 39 to 42 at the time of signature are subject to confirmation upon ratification, acceptance or approval.

2. Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.

3. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

4. A State that makes a declaration under articles 36, paragraph 1, 37 or 39 to 42 may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

5. In the case of a declaration under articles 36, paragraph 1, 37 or 39 to 42 that takes effect after the entry into force of this Convention in respect of the State concerned or in the case of a withdrawal of any such declaration, the effect of which in either case is to cause a rule in this Convention, including any annex, to become applicable:

(a) Except as provided in paragraph 5 (b) of this article, that rule is applicable only to assignments for which the contract of assignment is concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 1 (a);

(b) A rule that deals with the rights and obligations of the debtor applies only in respect of original contracts concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 3.

6. In the case of a declaration under articles 36, paragraph 1, 37 or 39 to 42 that takes effect after the entry into force of this Convention in respect of the State concerned or in the case of a withdrawal of any such declaration, the effect of which in either case is to cause a rule in this Convention, including any annex, to become inapplicable:

(a) Except as provided in paragraph 6 (b) of this article, that rule is inapplicable to assignments for which the contract of assignment is concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 1 (a);

(b) A rule that deals with the rights and obligations of the debtor is inapplicable in

respect of original contracts concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 3.

7. If a rule rendered applicable or inapplicable as a result of a declaration or withdrawal referred to in paragraph 5 or 6 of this article is relevant to the determination of priority with respect to a receivable for which the contract of assignment is concluded before such declaration or withdrawal takes effect or with respect to its proceeds, the right of the assignee has priority over the right of a competing claimant to the extent that, under the law that would determine priority before such declaration or withdrawal takes effect, the right of the assignee would have priority.

References

A/CN.9/445, paras. 79 and 80; A/CN.9/455, paras. 145 and 146; A/CN.9/466, para. 206; and A/CN.9/486, paras. 121-123 and 134.

Commentary

67. Paragraphs 1 to 4 reflect standard treaty law practice. Under paragraphs 1 and 2, declarations made at the time of signature must be confirmed at the time a State declares its consent to be bound; and declarations and confirmations must be in writing and formally notified to the depositary. Under paragraph 3, a declaration takes effect at the same time the Convention enters into force in respect of the State making the declaration. There is a six-month delay if the depositary is notified of the declaration after the entry into force. The six-month period starts at the time of receipt of the formal notification by the depositary and ends on the first day after the expiry of the six-month period. Under paragraph 4, withdrawals of declarations take effect on the first day after the expiry of six months after the receipt of the formal notification by the depositary. Paragraphs 5 through 7 deal with issues relating to the transitional application of the draft Convention.

Article 44
Reservations

No reservations are permitted except those expressly authorized in this Convention.

References

A/CN.9/455, paras. 147 and 148

Commentary

68. Article 44, which reflects standard treaty law practice, is intended to ensure that no reservation is made other than those expressly authorized in articles 36, paragraph 1, 39 to 41 and 42, paragraph 5, that exclude or modify the effect of certain provisions of the draft Convention.

Article 45
Entry into force

1. This Convention enters into force on the first day of the month following the expiration of six months from the date of deposit of the fifth instrument of ratification, acceptance, approval or accession with the depositary.

2. For each State that becomes a Contracting State to this Convention after the date of deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of six months

after the date of deposit of the appropriate instrument on behalf of that State.

3. This Convention applies only to assignments if the contract of assignment is concluded on or after the date when this Convention enters into force in respect of the Contracting State referred to in article 1, paragraph 1 (a), provided that the provisions of this Convention that deal with the rights and obligations of the debtor apply only to assignments of receivables arising from original contracts concluded on or after the date when this Convention enters into force in respect of the Contracting State referred to in article 1, paragraph 3.

4. If a receivable is assigned pursuant to a contract of assignment concluded before the date when this Convention enters into force in respect of the Contracting State referred to in article 1, paragraph 1 (a), the right of the assignee has priority over the right of a competing claimant with respect to the receivable and its proceeds to the extent that, under the law that would determine priority in the absence of this Convention, the right of the assignee would have priority.

References

A/CN.9/455, paras. 149 and 150; A/CN.9/466, para. 206; and A/CN.9/486, paras. 127-131.

Commentary

69. Paragraphs 1 and 2 reflect standard treaty law practice. Paragraphs 3 and 4 are intended to ensure that rights acquired before the entry into force of the draft Convention are not affected by it.

Article 46
Denunciation

1. A Contracting State may denounce this Convention at any time by written notification addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

3. This Convention remains applicable to assignments if the contract of assignment is concluded before the date when the denunciation takes effect in respect of the Contracting State referred to in article 1, paragraph 1 (a), provided that the provisions of this Convention that deal with the rights and obligations of the debtor remain applicable only to assignments of receivables arising from original contracts concluded before the date when the denunciation takes effect in respect of the Contracting State referred to in article 1, paragraph 3.

4. If a receivable is assigned pursuant to a contract of assignment concluded before the date when the denunciation takes effect in respect of the Contracting State referred to in article 1, paragraph 1 (a), the right of the assignee has priority over the right of a competing claimant with respect to the receivable and its proceeds to the extent that, under the law that would determine priority under this Convention, the right of the assignee would have priority.

References

A/CN.9/455, paras. 151-155; A/CN 9/466, para. 206 and A/CN.9/486, paras. 132-133.

Commentary

70. Article 46 is intended to ensure that a Contracting State may denounce the draft Convention. With a view to ensuring certainty, paragraphs 3 and 4 provide that a denunciation does not affect rights acquired before it takes effect.

Article 47
Revision and amendment

1. At the request of not less than one third of the Contracting States to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

References

A/CN.9/466, paras. 207 and 208; and A/CN.9.486, paras. 135-136.

Commentary

71. Article 47 is a provision found in other UNCITRAL texts (e.g. article 32 of the United Nations Convention on the Carriage of Goods by Sea, 1978, (Hamburg Rules)).

Annex to the draft Convention

Purpose of the annex

References

A/CN.9/420, paras. 155-164; A/CN.9/434, paras. 239-258; A/CN.9/445, paras. 18-44 and 83-93; A/CN.9/455, paras. 18-32 and 120-123; and A/CN.9/486, paras. 137-142.

Commentary

72. Articles 24 to 26 refer priority issues to national law (the law of the assignor's location). However, national priority rules may not exist; they may be outdated or not fully adequate in addressing all relevant problems. For that reason, the annex to the draft Convention, which a State may opt into, contains alternative substantive law priority rules, based on the time of assignment, notification or registration. In order to determine whether their priority rules need revision, States may wish to compare them with the rules set forth in the annex.

73. The rules, set forth in the annex, are intended to serve as a model for national legislation. If a State chooses to enact them by declaration, the choices and effects will be as prescribed in article 42. If a State enacts them independently of the draft Convention, the limitations of article 42 would not apply. There is an additional level of flexibility. These rules do not necessarily form a complete model law. States, therefore, might need to supplement them with additional provisions. For example, if a registration-based system is chosen, some practices may need to be excluded from a registration-based priority regime and subjected to a different priority regime; and the registration rules would need to be supplemented by appropriate regulations. In general, a section of the annex applies only if article 24 applies (i.e. the conditions of the application of the Convention are met and the forum is in a Contracting State) and the assignor's State has made a declaration under article 42 (see also article 1, paragraph 5). The choices available to

States and their effects are set forth in article 42 (see para. 65). As the annex will apply in such a case through articles 24 to 26, the scope and the meaning of the terms in those articles will determine also the scope and the meaning of the terms of the provisions of the section of the annex opted into by the assignor's State.

Section I
Priority rules based on registration

Article 1
Priority among several assignees

As between assignees of the same receivable from the same assignor, the priority of the right of an assignee in the assigned receivable and its proceeds is determined by the order in which data about the assignment are registered under section II of this annex, regardless of the time of transfer of the receivable. If no such data are registered, priority is determined by the order of the conclusion of the respective contracts of assignment.

References

A/CN.9/445, paras. 88-90; A/CN.9/466, paras. 167 and 168; and A/CN.9.486, paras. 143-145.

Commentary

74. The registration system envisaged in article 1 involves the voluntary entering of certain data about an assignment in the public record. The purpose of such registration is not to create or constitute evidence of property rights, but to protect third parties by putting them on notice about assignments made and to provide a basis for settling conflicts of priority between competing claims. Because of its limited function and for it to be simple, quick and inexpensive, the registration envisaged in article 1 requires a very limited amount of data (specified in article 4 of the annex) to be placed on public record. If no assignee files the required data, the first-in-time assignee prevails.

75. The policy underlying article 1 (and sections I and II) is that giving potential financiers notice about assignments and determining priority in receivables on the basis of a public filing system will enhance certainty as to the rights of financiers. This, in turn, would have a beneficial impact on the availability and the cost of credit on the basis of receivables. The priority rules in section I may operate with an existing national registration system or with a system under section II. Terms used in article 24 and in the provisions of the annex have the same meaning. For example, a person with a right in a receivable derived from a right in another asset should be treated as an assignee (and not as a creditor of the assignor). Accordingly, a conflict between an assignee and such a person would be subject to article 1 and not to article 2 of the annex.

Article 2
Priority between the assignee and the insolvency administrator or creditors of the assignor

The right of an assignee in an assigned receivable and its proceeds has priority over the right of an insolvency administrator and creditors who obtain a right in the assigned receivable or its proceeds by attachment, judicial act or similar act of a competent authority that gives rise to such right, if the receivable was assigned, and data about the assignment were registered under section II of this annex, before the commencement of such insolvency proceeding, attachment, judicial act or similar act.

References

A/CN.9/466, paras. 169 and 170; and A/CN.9/486, paras. 146-149.

Commentary

76. Article 2 is intended to reflect the principle that, if registration takes place before the commencement of an insolvency proceeding with regard to the assets and affairs of the assignor or before attachment of the receivables in the hands of the assignor, the assignee has priority. In view of the fact that provisions of the annex would apply as a result of the application of article 24, no reference is included to article 25 or the other conditions or limitations of the application of article 24, since they are all implicit.

Section II
Registration

Article 3
Establishment of a registration system

A registration system will be established for the registration of data about assignments, even if the relevant assignment or receivable is not international, pursuant to the regulations to be promulgated by the registrar and the supervising authority. Regulations promulgated by the registrar and the supervising authority under this annex shall be consistent with this annex. The regulations will prescribe in detail the manner in which the registration system will operate, as well as the procedure for resolving disputes relating to that operation.

References

A/CN.9/445, paras. 94-103; A/CN.9/466, paras. 171 and 172; A/CN.9/486, paras. 150-153.

Commentary

77. The policy underlying article 3 is that, while the annex should include some basic provisions about registration, the mechanics of the registration process should be left to regulations to be prepared by the registrar and the supervising authority. In principle, the regulations do not need to be more detailed than is practically necessary and the registrar and the supervising authority should have sufficient flexibility in preparing the regulations. For those reasons, article 3 refers to the regulations prescribing "in detail" (but not "exactly") the operation of the registration system. The registrar (who may, presumably, be a private entity) and the supervising authority (which is intended to be an intergovernmental organization) will be entrusted with the task of promulgating the regulations, as well as ensuring the efficient operation of the system.

Article 4
Registration

1. Any person may register data with regard to an assignment at the registry in accordance with this annex and the regulations. As provided in the regulations, the data registered shall be the identification of the assignor and the assignee and a brief description of the assigned receivables.

2. A single registration may cover one or more assignments by the assignor to the assignee of one or more existing or future receivables, irrespective of whether the receivables exist at the time of registration.

3. A registration may be made in advance of the assignment to which it relates. The

regulations will establish the procedure for the cancellation of a registration in the event that the assignment is not made.

4. Registration or its amendment is effective from the time when the data set forth in paragraph 1 of this article are available to searchers. The registering party may specify, from options set forth in the regulations, a period of effectiveness for the registration. In the absence of such a specification, a registration is effective for a period of five years.

5. Regulations will specify the manner in which registration may be renewed, amended or cancelled and regulate such other matters as are necessary for the operation of the registration system.

6. Any defect, irregularity, omission or error with regard to the identification of the assignor that would result in data registered not being found upon a search based on a proper identification of the assignor renders the registration ineffective.

References

A/CN.9/445, paras. 104-117; A/CN.9/466, paras. 173-178; and A/CN.9/486, paras. 154-159.

Commentary

78. The purpose of article 4 is to establish the basic parameters for an efficient registration system. Those basic parameters include the public character of the registry, the type of data that need to be registered, the ways in which the registration-related needs of modern financing practices may be accommodated and the time of effectiveness of registration. The registry envisaged is a public registry. However, in order to avoid any abuses, limitations may need to be introduced as to who may register (e.g. only persons with a legitimate interest or with the authorization of the assignor) and the assignor may need to be given the right to demand deregistration. In referring to registration "in accordance with this annex and the regulations", paragraph 1 leaves those issues to the regulations. The regulations (or other legislation) could also deal with abusive and fraudulent registration, although this matter should normally not pose a problem, since registration under article 4 does not create any substantive rights. In any case, the issue of any loss caused as a result of an unauthorized or fraudulent registration could be addressed by general tort, fraud or even criminal law rules. The data to be registered, under paragraph 1, include identification of the assignor and the assignee and a brief description of the assigned receivables. The type of identification required is left to the regulations. It is meant to include, however, identification by number. The words "brief description" are intended to include a generic description, such as "all my receivables from my car business" or "all my receivables from countries A, B and C". The sufficiency of a non-specific description of the receivables is also left to the regulations.

79. Paragraphs 2 and 3 are key provisions in that they are intended to ensure the efficient operation of the registration system and to accommodate the needs of significant transactions. Under paragraph 2, a single notice could cover a large number of receivables, existing or future, arising from one or several contracts, as well as a changing body of receivables and a constantly changing amount of secured credit (revolving credit). Without these features, registration would be expensive, slow and inefficient. Any abuse, which could harm the assignor but could not create any substantive rights, is left to the regulations or other legislation. Under paragraph 3, registration may take place even before an assignment is made. For the assignee to be able to release funds, there is a need to ensure that registration can be effected as soon as possible. The regulations may prescribe the way in which this pre-registration may be effected.

80. Under paragraph 4, registration or its amendment is effective when searchers are able to obtain access to the data registered. This means that, if the assignor becomes insolvent after registration but before the data become available to searchers, the risk of any events that may

affect the interests of the registering party is placed on that party. Such a risk would be significantly reduced if there is no time gap between data being registered and becoming available to searchers, which is possible in the case of a fully computerised registration system. Paragraph 4 permits registering parties to choose the length of time of effectiveness from a range of options set out in the regulations. In the absence of a choice, the time of effectiveness is five years. Renewals, discharges and amendments, as well any other matter necessary for the operation of the registry, are left to the regulations (paragraph 5). With a view to preserving registrations with minor errors, paragraph 6 invalidates a registration only if there is a defect, irregularity or omission in the identification of the assignor that would preclude searchers from finding the data registered. The underlying rationale is that: if the error is made by the registering party, that party should suffer the consequences; and if the error is committed by the registrar, the registrar should be held liable (an issue that may be addressed in the regulations or general law). The words "would result" are intended to ensure that the registration would be ineffective, in the case of a significant error in the identification of the assignor, even if no one was actually misled.

Article 5
Registry searches

1. Any person may search the records of the registry according to identification of the assignor, as set forth in the regulations, and obtain a search result in writing.

2. A search result in writing that purports to be issued by the registry is admissible as evidence and is, in the absence of evidence to the contrary, proof of the registration of the data to which the search relates, including the date and hour of registration.

References

A/CN.9/445, paras. 118 and 119; A/CN.9/466, paras.179 and 180; and A/CN.9/486, paras. 160-161.

Commentary

81. Article 5 is intended to enshrine the principle of public access to the registry for searching purposes as opposed to registration purposes. Only a publicly accessible registry could provide the transparency necessary with regard to the rights of third parties. Such public access to the registry does not infringe upon the level of confidentiality necessary in financing transactions, since only a limited amount of data would be available in the registry. Article 5 also provides for the admissibility and the general evidential value of a search record in a court or other tribunal. A search record is, in particular, evidence of the registration and its date and hour.[3]

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[3] The commentary on articles 6 to 9 of the annex will be written once those articles are finalized pursuant to a proposal to be submitted by States (see A/CN.9/486, paras 163, 165 and 168).